

Date of Hearing: April 26, 2011

ASSEMBLY COMMITTEE ON VETERANS AFFAIRS

Paul J. Cook, Chair

AB 905 (Pan) – As Introduced: February 17, 2011

SUBJECT: Disposition of remains, authorized agent

SUMMARY: Seeks to formally recognize in state law the U.S. Department of Defense ("DoD") DD Form 93 Record of Emergency Data ("RED") as an acceptable written instrument of a military service member's designation of a person to direct the disposition of his or her remains. Specifically, this bill provides that the designation by a service member of a person authorized to direct disposition ("PADD") on a the RED shall be sufficient to establish an agent who has the right and duty of disposition of the remains of that service member, provided he or she died while on duty in any Branch or Component of the U.S. Armed Forces, as defined in Section 1481 of Title 10 of the United States Code.

EXISTING LAW:

- 1) Permits a competent adult to execute a power of attorney for health care that may authorize the designated agent to make health care decisions as well as decisions relating to the personal care of the principal. (Probate Code Section 4671.)
- 2) Permits the agent, subject to limitations in the power of attorney for health care, to also make decisions that may be effective after the principal's death, including directing the disposition of remains under Section 7100 of the Health & Safety Code. (Probate Code Section 4683.)
- 3) Provides that the right to control the disposition of the remains of a deceased person, the location and conditions of internment, and arrangements for funeral goods and services to be provided, unless other directions have been given by the decedent pursuant to a power of attorney for health care, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named:
  - i) an agent under a power of attorney for health care, as provided;
  - ii) the competent surviving spouse or domestic partner;
  - iii) surviving competent adult children;
  - iv) surviving competent parents;
  - v) surviving competent adult sibling;
  - vi) surviving competent adult person in the next degree of kinship;
  - vii) the public administrator when the deceased has sufficient assets. (Health & Safety Code Section 7100(a); Family Code Section 297.5)
- 4) Provides that the agent under the power of attorney for health care who has the right and duty of disposition is liable for the costs of disposition only in either of the following cases:
  - i) Where the agent makes a specific agreement to pay the costs of disposition.
  - ii) Where, in the absence of a specific agreement, the agent makes decisions concerning disposition that incur costs. In which case, the agent is liable only for the reasonable

- costs incurred as a result of the agent's decisions, to the extent that the decedent's estate or other appropriate fund is insufficient. (Health & Safety Code Section 7100(a)(1).)
- 5) Pursuant to the United States Code, provides that the Secretary of Defense may provide for the recovery, care, and disposition of the remains of certain categories of military service members, including (among others):
- i) Any Regular of an armed force under his jurisdiction who dies while on active duty;
  - ii) A member of a reserve component of an armed force who dies while on active duty, performing inactive-duty training, or under certain other conditions;
  - iii) Various other members, applicants for enlistment, retired members, and other persons, as specified. (10 U.S.C. 1481.)
- 6) Pursuant to the United States Code, only the following persons may be designated to direct disposition of the remains of a military service member:
- i) The surviving spouse of the decedent
  - ii) Blood relatives of the decedent
  - iii) Adoptive relatives of the decedent
  - iv) A person standing in loco parentis to the decedent if no person covered by (a) to (c) can be found. (10 U.S.C. 1482.)
- 7) Establishes responsibilities and uniform personnel policies and procedures for notifying and assisting the next of kin when an active duty service member sustains injury or dies. (DoD Instruction 1300.18.)

#### COMMENTS:

Pursuant to Section 564 of U.S. Public Law 109-163, active duty and activated guard/reserve members of the military must complete the federally mandated DD Form 93, in which, among other things, they must designate a person authorized to direct disposition ("PADD") of their remains in the event of death. The document is witnessed by an authorized military official, and is updated prior to each deployment and every year on the service member's birthday. The service member may make changes to his or her DD Form 93 at any time by accessing the record through special Internet websites maintained by the DoD.

The PADD is of significance to the DoD because in the event of the member's death, the Department is required to contact the PADD designated on Form 93 in order to provide the burial entitlements that deceased service members are entitled to pursuant to 10 U.S.C. §1482(a). The PADD is designated in Item 13a of the current version of DD Form 93. California law, however, does not recognize the DD Form 93 as an acceptable written document for service members in lieu of a durable power of attorney for health care. This could pose a problem if the person authorized to direct disposition by the service member on his DD Form 93 differs from the person authorized to do so pursuant to Health & Safety Code Section 7100, which specifies a hierarchy of persons from which to determine the authorized person, the first being an agent under a power of attorney for health care if one was designated. This bill seeks to prevent conflict over the disposition of remains of fallen service members by formally validating the

designation of a person authorized to direct disposition on DD Form 93 for that same purpose under existing state law.

Policy Question: The bill does not make the DD Form 93 PADD the first choice in the hierarchy of people under HSC Section 7100; it makes the PADD co-equal with the hierarchal first choice, the agent for power of attorney for health care. Thus if the PADD and the agent for power of attorney for healthcare differ, as the bill is written now, the author's stated goal of litigation avoidance (see below) is not served. Should the DD Form 93 be placed at the top level of the hierarchy, above the agent for power of attorney for health care?

Author's Statement: According to the author, the bill is intended to avoid potential civil litigation between family members and provide clarity during the stressful time of bereavement after the loss of a service member. In support of the bill, the author writes:

All military service members complete the federally mandated United States Defense Department Form 93 (DD Form 93) designating Persons Authorized to Direct Disposition (PADD) of their remains in the event that the unfortunate should occur. . . . California law does not currently recognize the DD Form 93 as an acceptable written document for service members. This conflict between state and federal law creates the potential for civil actions between family members over the ultimate disposition of a fallen service member's remains.

Limited Applicability in Reserve Duty Situations. DD Form 93 only applies when the member dies while serving in a duty status in which the Department of Defense requires that the designated PADD direct the disposition of remains as a condition for Department-provided burial entitlements. The bill accomplishes this by specifically limiting its applicability to cases where the service member "died while on duty in any branch or component of the Armed Forces of the United States, as defined by Section 1481 of Title 10 of the United States Code."

Prior Related Legislation: AB 2190 (Block) last year would have likewise recognized in state law the U.S. Department of Defense DD Form 93 (Record of Emergency Data). The bill died in the Senate Judiciary Committee due to the potential conflict with California law regarding the designation of a domestic partner as an agent having the right and duty of disposition of the service member's remains.

#### REGISTERED SUPPORT / OPPOSITION:

##### Support

Veterans of Foreign Wars (sponsor)

##### Opposition

None on file

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